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EUROPEAN COMPETITION LAWS

Publication 1254 Release 23 December 2024

HIGHLIGHTS

- The following chapters were thoroughly reviewed and revised:
- Chapter 3 (*Belgium*); Chapter 3A (*Bulgaria*); Chapter 4 (*Denmark*); Chapter 5 (*Finland*);
- Chapter 6 (*France*); Chapter 7 (*Germany*); Chapter 8A (*Hungary*); Chapter 10 (*Italy*);
- Chapter 10A (*Latvia*); Chapter 10B (*Lithuania*); Chapter 11A (*Malta*)
- Chapter 12A (*Poland*); Chapter 13 (*Portugal*); and Chapter 14 (*Spain*)
- Special Alert: Chapter 8 (*Hellenic Republic/Greece*)
- Special Alert: Chapter 13B (*Slovak Republic*)
- Special Alert: Chapter 17 (*United Kingdom*)
- ECN+ Directive
- New EU Vertical Block Exemption Regulation
- 2023 Guidelines on Horizontal Co-operation Agreements
- Digital Markets Act & Digital Services Act
- Foreign Subsidies Regulation
- "Killer Acquisitions" and UK's DMCC Bill

In **Chapter 3—*Belgium*** . . .

The leniency program of the BCA allows a company participating in a cartel to report it to the BCA and therefore enjoy immunity from prosecution or a reduction in the amount of fines (*see* § 3.06[2]).

Bid rigging remains an area of focus for the BCA. For example, the BCA also fined three players active in the supply of fire safety for assign-

ing government bids among them to keep existing customers by either not bidding or bidding at a higher price. Two players benefitted from the leniency notice to obtain immunity or a reduction in fine.

The BCA is led by a Managing Board, which is notably in charge of the day-to-day management of the authority, the determination of its management priorities, and the drafting of guidelines on the enforcement of competition rules. It is composed of the President, the Competition Prosecutor General, the General Counsel, and the Chief Economist. Since 2024, a fifth member was added to the BCA's Management Committee, namely the Planning and Budget Director.

Starting from March 2024, hospital mergers and acquisitions only need to be notified if the parties have a combined turnover in Belgium that exceeds EUR 900 million and each of the parties have an individual turnover that exceeds at least EUR 250 million.

In **Chapter 3A—*Bulgaria*** . . .

Hospitals do not qualify as undertakings with regards to their state-funded healthcare activities because the latter utilize public funds and fall within hospitals' statutorily mandated public remit.

The Bulgarian Group Block Exemption Rules blacklist the restriction of active or passive sales by the exclusive distributor and its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services.

In **Chapter 4—*Denmark*** . . .

There have been numerous amendments to the Competition Act; with the most recent substantive changes in 2024 introducing new principles for calculating fines for substantive infringements, a call-in option for mergers falling below the national thresholds, and an option for market investigations with behavioural orders. For the latest Competition Act, *see* Consolidated Executive Order No 360 of March 4, 2021, as amended by Law No 2601 of December 28, 2021, and Law No 638 of June 11, 2024.

In **Chapter 5—*Finland*** . . .

The focus of the Finnish Competition and Consumer Authority has in the recent years been strongly on merger control even though 2023/24 saw the slow new coming of cartel investigations. So-called second phase merger control investigations have increased considerably and prenotification procedures resemble those of the EU Commission in both length and substantive depth. Pan-Nordic coordination of the merger review activities by the Nordic competition authorities has also steadily increased. The lowering of the merger control notification thresholds has clearly led to more deals being notified even though most of these have been cleared in phase I. 2023/24 saw the opening of several behavioral investigations and at least three sector inquiries (assisted living services, influencers, and small animal veteri-

nary services) thus far.

In **Chapter 6—*France*** . . .

In the last quarter of 2023, the Competition Authority launched an online platform to encourage whistleblowers to report anticompetitive practices while guaranteeing anonymity, confidentiality and protection from legal proceedings or retaliation. It also published a revised leniency procedural notice.

In April 2024, the French government introduced a bill with the aim to increase the merger control turnover thresholds. Under the new thresholds, a concentration would have to be notified to the Competition Authority where: (i) the worldwide turnover of all the undertakings concerned exceeds EUR 250 million; and (ii) the French turnover of at least two of the undertakings concerned exceeds EUR 80 million. The adoption is planned for the end of the year 2024.

In May 2024, the Competition Authority examined for the first time several transactions that had not been subject to an *ex ante* review in the meat-cutting sector, applying the CJEU's *Towercast* judgement and extending it to cartel conduct. The Competition Authority found that, although exchanges had taken place between the parties, they constituted discussions in preparation for a merger and did not establish the existence of a market allocation plan, and therefore dismissed anticompetitive concerns.

In June 2024, the Competition Authority sanctioned eleven companies in the pre-cast concrete products sector for cartel conduct (appeal pending), which was identified through criminal investigation, potentially setting the trend for increased criminal enforcement against antitrust infringements in France. Criminal proceedings against employees of the companies' fines are still ongoing.

In **Chapter 7—*Germany*** . . .

The latest amendment to the German Act against Restraints of Competition entered into force in November 2023. The amendment is aimed at making sector inquiries more effective. If the FCO finds in such an inquiry that there is a "significant and continuing malfunctioning of competition" in a market, it may order structural and behavioral remedies, potentially also the divestment of businesses as ultima ratio. The amended Act also makes it easier for the FCO to skim a company's profits from a competition law infringement, and it enabled the FCO to conduct investigations in DMA matters.

The FCO has continued to be a highly active competition authority, making a number of noteworthy decisions. For example, the FCO softened its stance on the "no single buyer" rule it had previously applied in football marketing cases. The media rights relating to the Bundesliga may now be sold to one single buyer. The FCO has also continued its investigations against, and designations of, "undertakings with paramount significance for competition across markets" under Section 19a GWB.

In (Special Alert) **Chapter**

8—*Hellenic Republic (Greece)* . . .

In early 2022, the Greek Parliament passed Law 4886/2022. The most significant amendments introduced by Law 4886/2022 are the following:

— A new Article 1A under the heading "invitation to prohibited collaboration and announcement of future intentions regarding invoicing of products and services" is being introduced into the Greek Law 3959/2011 on free competition. Under par. 1 of Article 1A, an undertaking shall be prohibited from proposing, coercing, inducing or in any other way inviting another undertaking to participate in an agreement between undertakings or in decisions by associations of undertakings or concerted practices, which have as their object the prevention, restriction or distortion of competition in the Greek territory, consisting of...

— Law 4886/2022 also introduces an amendment to Article 8 of Law 3959/2011, dealing with the prior notification of concentrations and the assessment thereof by the Competition Commission. More specifically, by virtue of the provisions of a new par. 4A to said Article 8, merging undertakings have been given the opportunity to propose remedies during the Phase 1 merger review period, whereas previously such remedies could come into play only during Phase 2. This has been achieved by allowing them to propose modifications to their concentration within 20 days from submitting to the Competition Commission their merger notification, enabling the Competition Commission to clear their merger at this early stage once it concludes that, following the proposed remedies, no competition law concerns are present.

Other amendments introduced by Law 4866/2022 concern the expansion of the competences of the Competition Commission, the powers of the Competition Commission to impose fines, the expansion of the scope of settlement procedures to cover not only horizontal agreements but also cases falling under Article 1A above, vertical agreements and abuses of dominance, leniency programs, the conduct of investigations and the penalties and criminal sanctions threatened for violations of the respective provisions.

In **Chapter 8A—*Hungary*** . . .

All responsibilities related to the safeguarding, monitoring and supervising of competition are conferred upon the HCO. The HCO is an independent institution operating under the direct control of Parliament.

The actual amount of fine is determined with regard to all relevant circumstances, in particular: to the gravity and duration of the illegal conduct, the market/business advantage gained by such conduct, the market position of the offenders, the degree of responsibility and any cooperation in the investigation. ... The fine may also be reduced, if the other conditions are met, if the applicant is unable to provide the HCO with all the evidence of the infringement at the time of the application, but undertakes to complete the application within the time limit set by the HCO, provided that the evidence justifying the reduction of the fine is provided in full within the deadline. ... A fine may also be waived or reduced if, in respect of an infringement in respect of which the European Commission may be particularly well placed to act, the applicant has submitted an application to the European Commission at the same time as it submits an identical application to the HCO, as the authority well placed to act under the Commission Notice, with regard to the duration of the infringement, without providing all the evidence at its disposal, but, where the HCO initiates proceedings in respect of the infringement, supplements its application and provides all the evidence at its disposal within the deadline specified by the HCO.

In **Chapter 10—*Italy*** . . .

The Law n. 214/2023 ("Annual Competition Law for 2023"), approved on December 30, 2023 provided for two relevant amendments: (i) the extension of the merger control review Phase II duration from 45 to 90 days, and (ii) the appointment of the ICA as the competent authority with respect to fair and contestable markets in the digital sector, meaning that the latter will be empowered to exercise the functions provided for by the Digital Markets Act ("DMA"). The ICA is in the process of approving a procedure regulating the exercise of the powers conferred upon it by the DMA.

Article 1, c. 5 of Law Decree n. 104/2023 conferred the Authority the power to intervene to address competition concerns which it may found upon carrying out a market investigation (*indagine conoscitiva*) pursuant to art. 12, c. 2 of the Law. In such cases, the Authority might impose to the interested undertaking the behavioral or structural measures required to address the concerns. The same undertaking might offer remedies which the Authority, following a market test, might make binding if suitable to address the concerns. The Authority has approved, in May 2024, a communication setting out the procedure and rules applicable where the former intends to exercise the new powers.

If a formal investigation is opened, Section 16(8) of the Law, as recently amended by Annual Competition Law 2023 provides that the Authority must reach a decision after a maximum of 90 calendar days, whereas the previous term amounted to 45 calendar days.

In **Chapter 10A—*Latvia*** . . .

In a recent *Construction cartel* case, the Competition Council found a bid rigging cartel among residential and commercial building construction companies where participants shared information and decided which bid should be won by which company. An interesting aspect in this case was that the main evidence was transcripts from audio recordings of sauna meetings among key shareholders and representatives of the construction companies obtained in criminal proceedings from corruption investigation case (*see* § 10A.05[6]).

In May 2024 the Competition Council has published joint bidding guidelines which sets out the framework under which joint bidding may be acceptable. Based on the guidelines, joint bidding is permissible if the bidder following thorough and objective evaluation concludes that it is not able to participate in the relevant bid alone. In case the bidder is able to submit the bid and fulfil the contract alone, joint bidding may only be allowed if efficiency defense stipulated in Article 11 section two of the Competition Law is satisfied.

In **Chapter 10B—*Lithuania*** . . .

The Law on Public Procurement strengthens position of claimants in the disputes pertaining to competition infringements that happened in the context of public procurement, namely bid rigging cases. By contrast to general provision of the Law on Competition, the Law on Public Procurement provides a presumption of the size of damage, which is 10% of contract value, or 10% of total payments under the contract, if contract was terminated. The wording of the law suggests that such presumption may be rebutted by the defendant. However, this is a very recent enactment is very fresh. Thus, it remains to be seen if the bar raised by the Lithuanian courts for such rebuttal would turn the presumption into a solid rule of the "minimum guaranteed award".

In **Chapter 11A—*Malta*** . . .

Furthermore, as already mentioned above, when requesting further information the Director General is required to state the legal basis, purpose and related sanctions for non-observance. The Maltese courts recently delved into this requirement, specifically, in *Central Cigarette Company Limited v. Director of the Office for Competition* (First Hall Civil Court 379/2010). The court held that although reasons must be provided for decisions, it is not required that each point made in the decision be delved into deeply. It was argued by the court that as long as the reasoning of the Director General is explained in a way which factually leads to the conclusion which was established, then the Director General would have satisfied this requirement. It was however noted that additional reasons must be given in relation to the controversial points of the decision. Therefore, if the reasons provided by the Director logically lead to the decision which is ultimately taken, then one cannot plead that the decision is wrongful on the basis that the Director General did

not give reasons for a decision.

In **Chapter 12A—*Poland*** . . .

Another important amendment to the Law was introduced in 2023 with the implementation of the ECN+ Directive. The amendments include introduction of parental liability doctrine to the Polish competition law—in case of the competition law infringement, the OCCP is now able to impose a fine jointly on the company participating in an restrictive agreement or abusing dominant position as well as on the company having a decisive influence over the infringer. New mechanisms regarding imposing fines were also introduced for associations of undertakings and in terms of fines for procedural infringements. From now on, the maximum threshold for fines for procedural infringements will also depend on the global turnover. Moreover, the ECN+ Directive implementation introduced changes to the leniency programme, streamlined dawn raids, codified legal professional privilege, and extended the scope of structural remedies in antitrust cases.

The implementation of the ECN+ Directive also facilitated mutual enforcement of fines and periodic penalty payments in the EU. In certain cases, the OCCP is authorised to request the assistance of another Member State in the enforcement of a fine imposed pursuant to Article 101 or 102 of the Treaty.

In **Chapter 13—*Portugal*** . . .

In a recent ruling, the European Court of Justice ("ECJ") confirmed that "an isolated exchange of information between competitors can constitute a competition restriction by object." This decision came in response to the Portuguese Competition Court's request for a preliminary ruling regarding the impact of proven facts on customers in the so-called '*banking cartel*' case. The ECJ emphasized that such exchanges inherently harm the proper functioning of competition by removing uncertainties about competitors' future behaviors.

In July 2024, the Portuguese Supreme Court ruled that the seizure of electronic mail in restrictive practices investigations is permissible only with prior judicial authorization. This ruling emphasized that judicial oversight is mandatory, applying to both read and unread emails under the provisions of the Portuguese Competition Law (Law no. 19/2012) and Cybercrime Law (Law no. 109/2009). This decision resolved discrepancies in earlier rulings regarding the competent authority to order email seizures, stating that the application of criminal procedural safeguards to competition law practices is essential for protecting constitutional privacy rights as stated in Article 34(4) of the Portuguese Constitution.

In (Special Alert) **Chapter 13B—*Slovak Republic*** . . .

This Special Alert briefly summarizes the following:

- Outcomes from the sectoral investigation regarding the rise in food prices con-

ducted by the Slovak competition authority—the Anti-Monopoly Office of the Slovak Republic (*Protimonopolný úrad Slovenskej republiky*) ("AMO")—in 2023;

- Increased AMO's effort to detect and sanction cartels;
- Expansion of the AMO's powers following the adoption of the DMA Regulation and the Foreign Subsidies Regulation;
- Change of courts involved in competition law enforcement;
- Recent case law of the Slovak Supreme Administrative Court regarding the burden of proof in cases where direct evidence of a competition law violation is lacking; and
- Addition of class actions for collective enforcement of consumer rights to compensation for damages caused by competition law infringements to the Slovak private enforcement "toolkit".

In **Chapter 14—*Spain*** . . .

As a result of the adoption of EU Regulation No. 2022/2560 on foreign subsidies distorting the internal market, known as the Foreign Subsidies Regulation ("FSR Regulation"), the Competition Act was modified in order to empower the NMCC to actively assist the EU Commission in inspections carried out by the latter directly on national territory, as well as to carry out inspections or other investigative measures requested by the EU Commission in accordance with the FSR Regulation.

In (Special Alert) **Chapter 17—*United Kingdom*** . . .

The Digital Markets, Competition and Consumers Act 2024 ("DMCC Act") received Royal Assent on 24 May 2024. This means the 'DMCC Bill' referenced throughout this chapter has now passed into law. As of August 2024, the vast majority of the changes were not yet in force, pending implementing legislation which will also provide significant detail on how the provisions of the Act will operate once implemented. Therefore, as of August 2024, it is not certain when the changes proposed to the UK competition regime will take effect nor the full details of all changes to be made.

One of the key changes introduced by the DMCC Act is: "The new regime for the *ex-ante* regulation of digital markets, focusing on firms designated as having "strategic market status". This will be overseen by the Digital Markets Unit, a specialist unit within the Competition and Markets Authority ("CMA"). In a significant departure from the UK's voluntary approach to merger control notification, there will be a new mandatory notification requirement for such firms, for acquisitions where the consideration is over £25 million."

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